55

3050

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902

No. ~~182~~ 70.

S. M. BURT AND H. R. BURT, PETITIONERS,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 1, 1901.
CERTIORARI AND RETURN FILED MAY 10, 1901.

(18,095.)

(18,095.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 282.

S. M. BURT AND H. R. BURT, PETITIONERS,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the circuit court of the United States for the western district of Texas	1	1
Caption	1	1
Plaintiffs' first amended original petition	1	1
Exhibit "A"—Policy	6	6
Defendant's first amended original answer	8	8
Judgment	12	11
Plaintiffs' petition for writ of error	13	12
Plaintiffs' assignments of error	14	13
Writ of error bond	16	14
Plaintiffs' bill of exceptions and approval of same	17	15
Writ of error and indorsement of waiver of citation in error thereon	19	17
Stipulation as to transcript and waiver of citation	20	18
Certificate of clerk	21	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 25, 1901.

	Original.	Print
Submission on briefs	22	19
Judgment of affirmance	22	19
Petition for rehearing	23	20
Order denying petition for rehearing	26	21
Opinion of the court	27	22
Dissenting opinion of McCormick, J.	33	25
Certificate of clerk	37	28
Stipulation as to return to writ of certiorari	38	28
Writ of certiorari	40	29
Return to writ of certiorari	42	30

a *Caption.*

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth judicial circuit, begun on the third Monday of November, 1899, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

S. M. BURT and H. R. BURT, Plaintiffs in Error,
vs.
UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, Ohio, Defendants in Error. } No. 864.

Be it remembered that heretofore to wit on the 4th day of August, 1899, a transcript of the record of the above-styled cause from the circuit court of the United States, for the western district of Texas was filed in the office of the clerk of said United States circuit court of appeals, in the words and figures following to wit:

1 *Caption.*

Be it remembered, that there was opened and begun to be holden, at Austin, Texas, a regular term of the United States circuit court for the western district of Texas, fifth circuit, on the 3rd day of July, A. D. 1899; it being the first Monday in said month, and the day fixed by law for commencing a regular term of said court at said place.

Present: The Honorable Thomas S. Maxey, United States district judge.

Honorable Henry Terrell, United States attorney for said district;

George L. Siebrecht, United States marshal for said district, and

D. H. Hart, clerk of said court; when and where the following, among other proceedings, were had to wit:

S. M. & H. R. BURT
versus.
THE UNION CENTRAL LIFE INSURANCE COMPANY. } No. 2306.

Plaintiffs' First Amended Original Petition.

Filed July 7, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit, July Term, A. D. 1899.

S. M. and H. R. BURT
vs.
THE UNION CENTRAL LIFE INSURANCE Company of Cincinnati, Ohio. } No. 2306. Common Law.

To the honorable the circuit court of the United States for
2 the western district of Texas, at Austin, fifth circuit:

Come now, by their attorney, your petitioners, S. M. Burt and H. R. Burt, and under leave of court, first had, file this their first amended original petition in the above numbered and entitled cause, amendatory and in lieu of their original petition, filed herein on the 16th day of December, A. D. 1898, and thereupon, complaining of The Union Central Life Insurance Company, of Cincinnati, Ohio, a corporation, which will be hereinafter styled defendant, respectfully represent:

First. That petitioners both reside in the county of Travis and State of Texas, while defendant is a private corporation, duly incorporated under the laws of the State of Ohio, having its principal office in the city of Cincinnati, in the county of Hamilton, and State of Ohio, its president being one John M. Pattison, who also resides in said last-named city, county and State, and having also an agent for the transaction of its business in said Travis county, Texas, to wit: one W. A. Boswell, who also resides in said last-named county and State.

Second. That heretofore, to wit: on or about the 1st day of August, A. D. 1894, said defendant for a valuable consideration, made, executed, issued and delivered to one William E. Burt, of said Travis county, Texas, its certain contract, or writing obligatory, to wit: a policy of life insurance on the life of said William E. Burt, (a copy whereof is hereunto annexed, marked Exhibit A and made part hereof), whereby, in consideration of the annual payment to it of the sum of one hundred and fourteen dollars and seventy cents, at its home office, on or before the 30th day of July, at noon, in every year during the term of twenty years from the date of said policy, and of the payment when due of any and all notes given for premiums or parts of same, said defendant bound itself to pay to Anna M. Burt, the wife of said William E. Burt, if living, otherwise to his executors, administrators or assigns, the sum of five thousand dollars, within sixty days after the receipt by defendant of notice and satisfactory proof of death of said William E. Burt.

Third. That thereafter, to wit: on or about the 10th day of September, A. D. 1895, the said named beneficiary Anna M. Burt, joined by her said husband William E. Burt, made, executed and delivered, for a valuable consideration, to petitioners, who then were and still are creditors of said William E. Burt and Anna M. Burt, and were both brothers of said William E. Burt, a written conveyance, transfer or assignment whereby they assigned and conveyed to petitioners
a one-half interest in said policy and the proceeds thereof,
3 and in virtue whereof petitioners then became and now are
the owners of and entitled to, the said one-half share.

Fourth. That thereafter, to wit: on or about the 24th day of July, A. D. 1896, said William E. Burt, being still alive, his said wife Anna M. Burt, died intestate, as did also on the same day her and said William E. Burt's two minor female children, Agnes Lucile and Anna E. Burt (the said two children being both unmarried and without issue or descendants) said two children being the only issue or descendants of her marriage with said Burt, or of either him or herself.

Fifth. That thereafter, to wit: on or about the 4th day of February, A. D. 1897, said William E. Burt, being then the sole owner and successor of and to all the rights and interest of said Anna M. Burt in and under said policy of insurance, for a valuable consideration made, executed and delivered to petitioners his certain written transfer, conveyance and assignment, whereby he assigned and conveyed to petitioners the said policy, together with all and singular his right, title and interest therein, authorizing them to receive and collect same when due and payable, and that thereby petitioners became entitled to and are now the owners of the remaining one-half interest in said policy.

Sixth. That whatever may be, or held or adjudged to be, the effect of said two instruments of assignment, or either of them, petitioners have become, and now are, nevertheless entitled to and the owners of said policy, the amount secured and agreed to be paid thereby and of any proceeds thereof, because they say that when the said insured William E. Burt died, as hereinafter stated, he died intestate, unmarried and without issue or descendants, and leaving surviving him neither father or mother, grandparents nor sister or brother, other than petitioners, nor their descendants, so that petitioners, who are as aforestated his brothers, are and were his only heirs-at-law, and became and were, and now are, as such heirs, there being no administration on his estate nor necessity therefor, the legal owners and holders of said policy and entitled to the full amount agreed thereby to be paid, to wit: said sum of five thousand dollars, according to the legal tenor and effect of said policy.

Seventh. That thereafter, to wit: on or about the 27th day of November, A. D. 1896, the said insured William E. Burt, having been indicted under the alias of Eugene Burt, for the murder of his said wife, Anna M. Burt, in the district court of Travis county, Texas, twenty-sixth judicial district, a court of competent jurisdiction, was in said court tried and convicted therefor of the offense of murder in the first degree, as in said indictment charged, and his

punishment assessed at death, the defense of insanity having
4 been interposed and put in issue, among other things, on the trial, and that thereafter, to wit: on or about the 26th day of April, A. D. 1898, in pursuance of said conviction, by a judgment and sentence of said district court on that day, said William E. Burt was by said district court sentenced to be hanged; and that thereafter, to wit: on or about the 27th day of May, A. D. 1898, pursuant to said judgment and sentence, and in virtue of a death warrant issued thereunder, the said William E. Burt was executed by the sheriff of Travis county, Texas, the proper officer to execute said sentence, by being on that day hanged by the neck until dead, and so on said day the said insured departed this life.

Eighth. That notwithstanding said conviction, judgment and sentence, said William E. Burt, the insured did not in fact commit said offence, nor in fact kill or bring about the death of the said Anna M. Burt, his wife, nor participate therein, nor was he guilty of said crime. And further petitioners aver that, even if (which is not admitted but again expressly denied) the said William E. Burt participated in the death of his said wife, said Anna M. Burt, or in fact actually killed her, yet such participation or act, if any, on his part, violated no condition or obligation, express or implied in anywise incumbent on him under said policy, nor avoided said policy nor his agreement and contract of insurance thereunder, nor forfeited any right of either himself or petitioners thereunder, because they say that at the time of the death, as aforesaid, of said Anna M. Burt, said insured William E. Burt, although of sound physical health had become and was insane, or of such a perverted and deranged condition of his mental and moral faculties as to render him incapable of distinguishing between right and wrong, and unconscious at the time of said act, if act there was, by him committed, of its nature, or, though conscious of said act and also able to distinguish between right and wrong and know the act to be wrong, yet his will, or the governing power of his mind, had been involuntarily on his part, so completely destroyed that his actions were not subject to it, but were beyond his control. And so petitioners say that there was and is no forfeiture of said William E. Burt's or their rights under said policy, nor any release or discharge of any liability of defendant or in virtue of said policy, even if said William had actually killed the said Anna M. Burt, which is again denied.

Ninth. That at the time of the death of said William E. Burt, the insured, said policy of insurance was a valid, binding and subsisting contract, and in full force and effect, and the first and second annual premiums due thereon, on to wit: respectively July 30,
5 1895, and July 30, 1896, had been fully paid to, and received, accepted and receipted for by, said defendant, and that, as to the only other annual premium falling due or becoming payable during the lifetime of said assured, same being the sum, as were the other two premiums, of one hundred and fourteen dollars and seventy cents, was on the day same became due, to wit: on the 30th day of July, A. D. 1897, before the hour of 12 o'clock noon of said day, as provided in said policy, duly and legally offered and ten-

dered to said company, defendant, and to its president said John M. Pattison, at the home office of defendant in the city of Cincinnati, in the State of Ohio, and acceptance thereof refused, and said company and its said president then and there notified that said money was held, would be held and kept ready to be, and would be, at any time then or thereafter, paid to defendant, or its agents or order. And petitioners further say that said money is now, and has ever since been, kept and held ready to be so paid, and they now here again tender and offer to so pay same to defendant or to pay same into court to be dealt with as the court shall direct, although they say that by its refusal to accept same defendant has waived its rights to such payment.

Tenth. That heretofore, to wit: on or about the 28th day of June, A. D. 1898, petitioners, being the sole legal owners and holders of said policy, and entitled to the said sum of five thousand dollars agreed to be paid thereby on the death of said William E. Burt, by defendant, within sixty days after receipt by it of notice and satisfactory proof of his death, presented to defendant, and it received such due and satisfactory notice and proof, as required by said policy, and made due demand of defendant for payment of said sum to them.

Eleventh. That by reason of the said death of said William E. Burt, the said sum of five thousand dollars agreed in said policy to be paid, thereupon became due, and the said period of sixty days after receipt by defendant of notice and satisfactory proof of his death having expired prior thereto said sum became payable on or about the 28th day of August, A. D. 1898, and is now long past due. But petitioners say that although they are justly and legally entitled thereto, and although same is long past due, and although petitioners have often demanded payment of same, yet defendants have hitherto wholly failed and refused and still refuses to pay same, or any part thereof, to petitioners' great damage, to wit: ten thousand dollars.

Twelfth. That by reason of the facts aforestated and because defendant being a life insurance company, and liable therefor, has failed within the said sixty days specified in said policy, and after demand made therefor, as aforesaid, to pay the said sum of five thousand dollars by said policy agreed to be paid, defendant has become liable and bound to pay to petitioners, the holders
6 of said policy, in addition to the said amount thereof, the further sum of twelve per cent. of said amount, or six hundred dollars, as damages, and also, further, all their reasonable attorneys' fees for the prosecution of this suit and the collection of said amounts. And petitioners say that because of the failure and refusal of defendant to pay said policy they have been compelled to institute this suit and employ the services of attorneys-at-law and counsel therein, and pay their fees, and that reasonable fees for services of such counsel will amount to the sum of twenty-five hundred dollars.

Premises considered, petitioners pray judgment for their said

debt, damages, interest, attorneys' fees and costs, and for general relief, etc.

GARDNER RUGGLES,
Attorney for Petitioners, S. M. & H. R. Burt.

"EXHIBIT A."

The Union Central Life Insurance Company.

No. 133,671. $5,000 (amount). $114.70 (premium).

Age, 26.

In consideration of the statements made in the application for this policy, which application is hereby made a part of this contract, and of the annual payment of the sum of one hundred fourteen and $\frac{70}{100}$ dollars, at the home office of the company, on or before the 30th day of July, at noon, in every year, during the term of twenty years from date hereof, and of the payment when due of any and all notes given for premiums, or parts of same, does insure the life of William E. Burt (the insured) of Austin, in the county of Travis in the State of Texas, in the amount of five thousand dollars, without participation in profits, for the term of his natural life. Upon the death of the insured the company agrees to pay at its home office, said amount of insurance to Anna M. Burt, his wife, if living, otherwise to the executors, administrators or assigns of the insured, within sixty days after the receipt of notice and satisfactory proof of death, the balance of the year's premium, with any and all other indebtedness to the company, being first deducted. This policy is issued and accepted subject to the benefits, provisions and conditions contained in the second page hereof, which are made a part of this contract, which contract shall be held and construed to have been made in the city of Cincinnati, Ohio.

After three years' premiums shall have been paid on this policy except in case of failure to pay at maturity a note given for premium or for a loan upon the security of this policy, the company will, upon legal surrender of this contract, before default of the payment of any premium, issue a paid-up, non-participating policy, payable as herein provided for the amount as named in Table A, on the following page.

In case of default in the payment of any premium after the third, except in case of failure to pay at maturity, a note given for premium, or for a loan upon the security of this policy, no surrender for a paid-up policy having been made, as afore provided, this policy will be continued in force only as a paid-up non-participating term policy, for such time only as named in Table C on the following page. If the death of the insured occurs, while the aforesaid term policy is in force, there shall be deducted from the amount insured a sum equal to the regular annual premiums, with interest that would have accrued had this policy been kept in force, said deduction not to exceed three regular premiums with interest.

Upon legal surrender of this policy on the 30th day of July, A. D. 1915, the company will pay in cash its entire reserved value, according to the actuaries' table of mortality, with 4 per cent. interest, to wit: the sum of $2,194, provided this policy shall not have been terminated previously, by lapse, death, or otherwise.

In witness whereof, the Union Central Life Insurance Company, by its president and secretary, signs this contract, at Cincinnati, Ohio, this 1st day of August, 1895.

JOHN M. PATTISON, *President.*

[SEAL.] E. P. MARSHALL, *Secretary.*

Conditions.

First. The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes, or interest upon notes given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes with their conditions, which may be given for premiums or loans upon the security of this policy, are hereby made a part of this contract of insurance.

Second. No suit to recover under this policy shall be brought after one year from the death of the insured.

Third. If the insured should, without the written consent of the company, at any time enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or if the insured should die by self-destruction, whether sane or insane, within three years from date hereof, this policy shall be null and void, and in case of said avoidance the reserve value only, according to the actuaries' table of mortality, with four per cent. interest, shall be paid on the surrender of this policy.

Except as hereinbefore provided, this policy shall be incontestible from any cause except misstatement of age. In case the age of the insured shall have been misstated the amount payable hereunder shall be such proportion of the sum insured as the premium paid bears to the required premium at the correct age of the insured.

Notice to Policy-holder.

All payments due on this policy for premiums or notes or interest upon notes given to the company, are payable at the office of the company in the city of Cincinnati, or to the authorized agent of the company on the production of the premium receipt (signed by the president or secretary) or the note given in payment of the premium.

The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the presi-

dent or secretary of the company, whose authority for this purpose shall not be delegated.

Should this policy be assigned or held as security, a duplicate of said assignment must be filed with the company, and due proofs of interest produced with proofs of death. This company does not guarantee the validity of any assignment.

Indorsement: No. 2306. Law. S. M. & H. R. Burt *vs.* The Union Central Life Insurance Co. Plaintiffs' first amended original petition. Filed July 7, 1899. D. H Hart, clerk. Gardner Ruggles, attorney for petitioners.

Defendant's First Amended Original Answer.

Filed July 7, 1899.

S. M. & H. R. BURT
vs.
UNION CENTRAL LIFE INSURANCE COMPANY.

9 Suit pending in the circuit court of the United States for the western district of Texas.

And now comes the defendant, and with leave of the court had and obtained, files this, its first amended original answer, in lieu of its original answer filed herein on the 7th day of February, 1899, and says:

It demurs to the first amended original petition of plaintiffs filed herein on the 7th day of July, 1899, and says that the same is insufficient to state a cause of action against this defendant, for the reason that it appears from the allegations therein that the assured died at the hands of the law under judgment of a court of competent jurisdiction; and of this, defendant prays the judgment of the court.

GEORGE F. PENDEXTER,
GEO. E. SHELLEY,
Attorneys for Defendant.

And for special exception herein, if need be, defendant says that so much of said petition as seeks to recover attorneys' fees, and twelve per cent. on the amount of the policy sued upon, for the reason that the laws of Texas, to wit: art. 3071 Revised Statutes of Texas, under which said claim is asserted, is in contravention of the fourteenth amendment to the Constitution of the United States, and hence states no valid cause of action against this defendant; and of this it prays the judgment of the court.

GEO. F. PENDEXTER,
GEO. E. SHELLEY,
Attorneys for Defendant.

And for answer herein, defendant denies all and singular the allegations in plaintiffs' petition contained, except in so far as the same are hereinafter admitted to be true, and demands strict proof of the same; and of this it puts itself upon the country.

And for answer in this behalf, defendant says that the plaintiffs ought not to have and maintain this suit, because the policy made the basis thereof, and all rights thereunder, were forfeited because the second premium due thereon was not paid on the date it fell due, to wit: July 30, 1896, and defendant says that by the terms of said policy, it is provided as follows:

"The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes or interest upon notes given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy are hereby made a part of this contract of insurance."

And said policy contains the further provision and stipulation, to wit:

"All payments due on this policy for premiums, or notes, or interest upon notes given to the company, are payable at the office of the company in the city of Cincinnati, or to the authorized agent of the company, on the production of the premium receipt (signed by the president or secretary) or the note given in payment of the premium."

That William E. Burt to whom said policy was issued was living on the 30th day of July, 1896, the day upon which the second premium thereon was due as aforesaid; that said William E. Burt failed and refused to pay said premium on said day, or to tender payment thereof, but that thereafter, to wit: on or about August 1, 1896, the plaintiffs herein tendered to Jefferson Johnson, who, at that time, was the duly authorized agent of defendant, at Austin, Texas, appointed by it under and by virtue of the provision of the policy hereinbefore set out, to receive said premium, and who, at that time, held the regular renewal receipt for said premium duly signed by the proper officers of defendant, of which fact plaintiffs then had notice, and which said tender was by said Johnson refused, and no receipt delivered therefor; that previous to the time said premium fell due, the said William E. Burt did, on, to wit: the 24th day of July, 1896, at Austin, Texas, murder his wife, Anna M. Burt, the beneficiary named in said policy, and his two minor children, Agnes Lucile Burt and Anna E. Burt, and was, at the time said tender was made, a fugitive from justice, which fact was well known to plaintiffs, at and before the time they made said tender; that the crime of murder was and is a capital crime, under the laws of the State of Texas, and punishable by death; that thereafter upon the refusal of defendant's said agent, Johnson, to receive said second premium, the plaintiffs, for the purpose of over-reaching and defrauding this defendant, caused the amount of said premium to be remitted by telegraph from Austin, Texas, to the home office of defendant at Cincinnati, Ohio; that in the transmission of said amount, plaintiffs concealed from the officers of defendant, at Cincinnati, Ohio, the fact

that the said premium had been tendered to and refused by defendant's authorized agent, the said Johnson, and concealed and withheld from defendant the fact that William E. Burt was a fugitive from justice, suspected of and charged with, the murder of his wife, the said Anna M. Burt and her children, and of which facts defendant had no notice: that in the telegraphic tender of said premium, the plain-
11 tiffs falsely and fraudulently stated that the same was made on behalf of the beneficiaries, when they well knew that Anna M. Burt, the only beneficiary named in said policy was then dead; and defendant charges that it was the wilful, deliberate purpose of the plaintiffs in making said tender, to fraudulently conceal from defendant, the increased risk occasioned by the crime of the said William E. Burt; and further, to conceal from defendant the fact that the said Anna M. Burt, the beneficiary named in said policy was dead, and that said plaintiffs sought by said telegram to fraudulently conceal from defendant the further fact that they then claimed to be the sole beneficiaries under said policy; that said money was received by one W. L. Davis, an employé, to wit, cashier, in the home office of defendant, who defendant says had no authority or power to receive the same; that said Davis had not been appointed or authorized by defendant to receive said premium, or any other premium, and had not been given, and did not have, a renewal receipt for said premium signed by the president or secretary of defendant; that immediately after defendant learned of the facts aforesaid, it repudiated and disavowed the action of said Davis in receiving said premium and insisted upon the enforcement of said forfeiture, and at once tendered to plaintiffs the amount of said premium, and now here tenders the same in open court.

(3.) And defendant says that said policy contains the further provision, to wit: "The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose shall not be delegated." And defendant says that there was no agreement in writing by its president or secretary by which said forfeiture was waived. Wherefore, defendant says that it ought not, by reason of the facts aforesaid, to be held to have waived said forfeiture. And defendant further says that plaintiffs have never paid or tendered to be paid the third premium on said policy; wherefore the said policy under its terms, was forfeited.

(4.) And for further answer in this behalf, defendant says that William E. Burt, the assured, under whom plaintiffs claim, to wit: on the 24th day of July, 1896, murdered his wife, Anna M. Burt, the beneficiary named in said policy, and by reason of whose death alone could said William E. Burt become entitled to any interest in said policy, and that said Burt, by reason of said murder, forfeited any and all rights which he might otherwise have had as the
12 heir or next of kin of said Anna M. Burt, and therefore, that plaintiffs, as the heirs of the said William E. Burt, can have no right to recover on said policy.

(5.) And for further answer in this behalf defendant says, that on, to wit: October 12, 1896, said William E. Burt, under the alias of Eugene Burt, was indicted in the district court of Travis county, Texas, a court of competent jurisdiction, for the murder of his said wife, Anna M. Burt, and that thereafter to wit: on the 27th day of November, 1896, in said court, the said William E. Burt was duly and legally convicted of murder in the first degree, on said indictment, and his punishment assessed at death; and that on the trial of said W. E. Burt, his sanity, at the time he committed the offence for which he was on trial, was directly put in issue, and the jury found him to have been sane when said offense was committed. And that thereafter, to wit: on the 26th day of April, 1898, by virtue of said judgment of conviction, the said William E. Burt was, by said court, duly sentenced to be hanged; that thereafter, to wit: on the 27th day of May, 1898, the said William E. Burt was duly hanged by the sheriff of Travis county, Texas, under and by virtue of the death warrant issued under said judgment.

Wherefore defendant says that plaintiffs ought not to recover, because it would be against public policy to permit the plaintiffs to recover on said policy, the said William E. Burt having died at the hands of public justice in the manner hereinbefore stated.

Wherefore, defendant prays that plaintiffs take nothing by this suit, and that it go hence and recover of plaintiffs all costs.

GEO. F. PENDEXTER,
GEO. E. SHELLEY,
Attorneys for Defendant.

(Indorsed:) No. 2306. S. M. & H. R. Burt *vs.* Union Central Life Insurance Co. Defendant's first amended original answer. Filed this 7 day of July, 1899. D. H. Hart, clerk, by J. W. Hancock, deputy.

Judgment.

Entered July 10, 1899.

S. M. & H. R. Burt
vs.
The Union Central Life Insurance Company. } No. 2306.

13 And now, on this 10th day of July, 1899, this cause being regularly called for trial, came the parties by their respective attorneys and announced themselves ready for trial. Whereupon the general demurrer and special exceptions interposed by the defendant to the first amended original petition of plaintiff were submitted to the court; and the court, having heard the argument of counsel thereon, and being fully advised thereon, being of the opinion that the law is with the defendant:

It is therefore considered, ordered, adjudged and decreed by the court that said demurrer and special exceptions be and they are hereby sustained. And the plaintiff declining to amend the case is hereby dismissed. And it is further ordered, adjudged and decreed by the court that the plaintiffs take nothing by their suit, and that

the defendant go hence and recover of plaintiffs all costs in this behalf expended for which let execution issue. To which ruling and judgment of the court the plaintiffs then and there in open court excepted.

Plaintiffs' Petition for Writ of Error.

Filed July 10, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. Burt
vs.
The Union Central Life Insurance Company of Cincinnati, Ohio. } No. 2306. Com. Law.

To the honorable the judges of the circuit court of appeals of the United States for the fifth circuit:

Come now the above-named plaintiffs by their attorney, and complain that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in said circuit court of the United States for the western district of Texas, at Austin, fifth judicial circuit, at its July term, A. D. 1899, of said court, against said plaintiffs, on the 10th day of July, A. D. 1899, manifest error hath happened to the great damage of said plaintiffs:

Wherefore, said plaintiffs, and each of them, pray for the allowance of a writ of error, and for an order fixing the amount of bond for a supersedeas in said cause, and for such other orders and
14 process as may cause the same to be corrected by the said circuit court of appeals of the United States for the fifth judicial circuit.

Dated this 10th day of July, A. D. 1899.

GARDNER RUGGLES,
Attorney for Plaintiffs.

Granted, July 10, 1899.

T. S. MAXEY, *Judge.*

(Indorsed:) No. 2306, com. law. S. M. & H. R. Burt *vs.* The Union Central Life Insurance Company of Cincinnati, Ohio. Plaintiffs' petition for writ of error. Filed July 10, 1899. D. H. Hart, clerk. Gardner Ruggles, attorney for plaintiffs.

Plaintiffs' Assignments of Error.

Filed July 10, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. BURT
vs.
THE UNION CENTRAL LIFE INSURANCE COMPANY OF Cincinnati, Ohio. } No. 2306.

Come now the plaintiffs in the above numbered and styled cause, by their attorney, and file the following assignments of error upon which they will rely in their prosecution of the writ of error in said cause.

First Assignment of Error.

That the honorable, the circuit court of the United States for the western district of Texas, at Austin, fifth judicial circuit, erred in sustaining the demurrer interposed by the defendant to the first amended original petition of plaintiffs, filed in said cause on the 7th day of July, A. D. 1899, and by holding and deciding that the facts stated in the said amended original petition are not sufficient to constitute or show a cause of action in said plaintiffs' favor against said defendant.

Second Assignment of Error.

That said circuit court erred in sustaining the first ground
15 of demurrer interposed by defendant to the first amended original petition of plaintiffs, filed July 7, A. D. 1899, and by holding, deciding and adjudging that said amended original petition does not state facts sufficient to constitute a cause of action in favor of plaintiffs against defendant, because it appears from said petition that William E. Burt, the assured in the policy of life insurance sued on, was indicted, tried, convicted and sentenced to death in a court of competent jurisdiction, of the offense of murder in the first degree and was executed in pursuance of such sentence, although it was also alleged in said petition that, notwithstanding such sentence and execution, said insured did not, in fact, commit, cause, or participate in said murder, but was at the time of its commission, and whether he committed or participated in it or not, insane, unconscious of the nature of his actions, if any, and wholly irresponsible therefore, said circuit court holding and deciding that the defense, amongst others of insured's insanity having been an issue in said criminal cause said conviction, sentence and execution of insured were conclusive as against plaintiffs' right to recover on the policy of insurance on his life, in controversy herein, whether insured in fact committed, caused or participated in said crime or not, and whether he was insane or not when it was committed.

Third Assignment of Error.

That said circuit court erred in sustaining the second ground of demurrer and special exception interposed by defendant to plaintiffs' said amended original petition, filed as aforesaid, in said cause, and by holding, deciding and adjudging that said amended original petition, in so far as it seeks a recovery by plaintiffs against defendant of the sum of twelve per cent. on the amount of the policy of life insurance sued on, as damages, and a recovery of attorneys' fees, is insufficient in law to constitute a valid cause of action in favor of plaintiffs against defendant in that behalf, because the statute or law of the State of Texas, to wit: article 3071, of the Revised Civil Statutes of the State of Texas, under and in virtue of which said two claims are asserted, is violative and in contravention of the fourteenth amendment to the Constitution of the United States.

Fourth Assignment of Error.

That said circuit court erred in rendering judgment against plaintiffs in said cause sustaining said demurrer and exceptions
16 and dismissing plaintiffs' suit upon the pleadings in said cause, and that said judgment is contrary to law and the facts as stated in said pleadings in said cause.

Wherefore the said plaintiffs pray that said judgment of said circuit court be reversed and such directions be given that full force and efficiency may inure to plaintiffs by reason of the aforesaid causes of action set forth and alleged in their said amended original petition filed in said cause.

GARDNER RUGGLES,
Attorney for Plaintiffs, Being Also Plaintiffs in Error.

(Indorsement:) No. 2306. Com. law. S. M. & H. R. Burt *vs.* The Union Central Life Insurance Company of Cincinnati, Ohio. Plaintiffs' assignment of error. Filed July 10, 1899. D. H. Hart, clerk.

Writ of Error Bond.

Approved and filed July 10, 1899.

Know all men by these presents: That we, S. M. Burt and H. R. Burt, as principals, and —— —— as sureties, are held and firmly bound unto The Union Central Life Insurance Company of Cincinnati, Ohio, in the full and just sum of five hundred dollars, to be paid to the said The Union Central Life Insurance Company of Cincinnati, Ohio, and its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 10th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at a session of the circuit court of the United States for the western district of Texas at Austin, fifth circuit, in a suit depending in said court, between the said S. M. Burt and H. R. Burt, plaintiffs, and The Union Central Life Insurance Company of Cincinnati, Ohio, defendant, a final judgment was rendered against the said S. M. Burt and H. R. Burt, plaintiffs, and the said S. M. Burt and H. R. Burt, plaintiffs, having obtained from said court a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the final judgment aforesaid, in the aforesaid suit, and a citation directed to the said The Union Central Life Insurance Company of Cincinnati, Ohio, defendant, is about to be issued,
17 citing and admonishing it to be and appear before the United States court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said S. M. Burt and H. R. Burt, plaintiffs, shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

S. M. BURT. [SEAL.]
H. R. BURT. [SEAL.]
GEO. W. LITTLEFIELD. [SEAL.]
WM. R. HAMBY. [SEAL.]

Sealed and delivered in presence of:
SAM. SHELLEY.
FRANK SMITH.

Approved this the 10th day of July, A. D. 1899.

T. S. MAXEY,
United States Judge.

(Indorsement:) No. 2306, law. S. M. Burt and H. R. Burt *vs.* The Union Central Life Insurance Company of Cincinnati, Ohio. Bond. Filed July 10, 1899. D. H. Hart, clerk.

Plaintiffs' Bill of Exceptions and Approval of Same.

Filed July 10, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. BURT
vs.
THE UNION CENTRAL LIFE INSURANCE Company of Cincinnati, Ohio. } No. 2306. Com. Law.

Be it remembered that on this the 10th day of July, A. D. 1899, the above numbered and entitled cause coming on for trial came on to be heard the demurrer and special exceptions of the defendant to the plaintiffs' first amended original petition, filed herein on the 7th day of July, A. D. 1899, as follows:

First. It was objected by defendant to plaintiffs' said amended original petition that same was insufficient in law to state a cause of action against defendant in favor of plaintiffs because it ap-
18 pears from the allegations thereof that William E. Burt the insured in the policy of life insurance sued on herein died at the hands of the law, it being alleged in said petition that said insured was indicted, tried, convicted and sentenced to death in a court of competent jurisdiction in that behalf, of the offense of murder in the first degree, notwithstanding a plea, in his behalf, among other defenses of his insanity, and was, pursuant to said sentence executed, although it was also alleged in said petition that notwithstanding said indictment, trial, conviction and sentence, said insured did not in fact commit said murder, nor cause nor participate in same, but that, if he did, or whether he did or not, he was at the time same was committed, insane, unconscious of the nature of his acts and wholly irresponsible therefor.

Second. It was objected also by defendant to plaintiffs' said amended original petition that same, in so far as it seeks a recovery, in favor of plaintiffs against defendant, of the sum of twelve per cent. on the amount of the policy of life insurance sued on by plaintiffs, as damages, and a recovery of attorneys' fees, is insufficient in law to constitute a valid cause of action in favor of plaintiffs against defendant, in that behalf, because the statute or law of the State of Texas, under and in virtue of which said two claims are asserted is violative and in contravention to the fourteenth amendment to the Constitution of the United States.

And thereupon the said objections of defendant to said amended original petition, as raised by its said demurrer and exceptions, were both sustained by the court, the court holding, as to said first ground of demurrer, that, insured's sanity having been in issue in said criminal cause, his conviction and sentence, and his execution pursuant thereto, were conclusive as against plaintiffs' right to recover on the policy of insurance on his life in controversy herein, whether insured in fact, committed, or caused or participated in said crime or not, or whether he was insane or not, when it was committed, and thereupon the court rendered judgment dismissing plaintiffs' suit.

And to the said rulings, and order and judgment of the court, sustaining said demurrer and exceptions and dismissing said suit, plaintiffs excepted and now here by their attorney present and tender this their bill of exceptions thereon, and pray that same may be settled and allowed and signed, sealed and certified by the judge of this court, as provided by law.

GARDNER RUGGLES,
Attorney for Plaintiffs.

19 In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. BURT
vs.
THE UNION CENTRAL LIFE INSURANCE COMPANY of Cincinnati, Ohio. } No. 2306. Com. Law.

The above and foregoing bill of exceptions presented by plaintiffs is in all respects correct and is hereby approved, allowed and settled, and ordered to be made a part of the record herein.

Signed and dated this 10th day of July, A. D. 1899, a day of the July term, A. D. 1899, and done in open court.

T. S. MAXEY, *Judge.*

(Indorsement:) No. 2306. S. M. & H. R. Burt *vs.* The Union Central Life Insurance Company, of Cincinnati, Ohio. Plaintiffs' bill of exceptions and order settling and allowing same. Filed July 10, 1899. D. H. Hart, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between S. M. and H. R. Burt, plaintiffs, and The Union Central Life Insurance Company, defendant, a manifest error hath happened, to the great damage of the said S. M. and H. R. Burt, plaintiffs, as by said complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States circuit court of appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

20 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of July in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] D. H. HART,
Clerk of the Circuit Court of the United States for the Western District of Texas, at Austin.

Allowed this, the 10th day of July, A. D. 1899.

T. S. MAXEY,
United States Judge.

(Indorsement:) No. 2306. S. M. & H. R. Burt *vs.* Union Central Life Insurance Company. Writ of error. Filed July 10, 1899. D. H. Hart, clerk.

I hereby waive issuance of citation in error and accept service thereof.

GEO. F. PENDEXTER,
Att'y for Def't.

July 10, 1899.

Stipulation as to Transcript and Waiver of Citation.

Filed July 10, 1899.

In the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit.

S. M. & H. R. BURT
vs.
THE UNION CENTRAL LIFE INSURANCE Company of Cincinnati, Ohio.
No. 2306. Com. Law.

In this cause it is agreed by and between plaintiffs and defendant, as follows:

First. That defendant hereby waives actual issue and service of citation in error, and accepts service of same, and agrees to appear and join issue in the circuit court of appeals of the United States for the fifth circuit, just as if all formalities had been duly complied with.

Second. That the transcript of the record for said circuit court of appeals shall consist only of copies of the following papers, viz: (1.) Plaintiffs' first amended original petition, filed July 7, 1899. (2.) Defendant's first amended original answer, filed same day. (3.) Judgment and order of circuit court sustaining defendant's
21 demurrer and exceptions to plaintiffs' petition and dismissing plaintiffs' suit. (4.) Plaintiffs' petition for writ of error. (5.) Order thereon. (6.) Plaintiffs' assignments of error. (7.) Plaintiffs' bond for writ of error, and order of approval. (8.) Plaintiffs' bill of exceptions and order settling and allowing same. (9.) Writ of error; and (10.) this stipulation.

Third. Plaintiffs shall have until October 1st, 1899, to file their briefs in said circuit court of appeals, and defendants shall have until November 1st, to file its briefs.

Witness our hands this 10th day of July, A. D. 1899.

S. M. BURT AND
H. R. BURT, *Plaintiffs.*
By GARDNER RUGGLES, *Their Attorneys.*
THE UNION CENTRAL LIFE INSURANCE CO.
By GEO. F. PENDEXTER, *Att'y.*

(Indorsement:) No. 2306. S. M. & H. R. Burt *vs.* Union Central Life Insurance Company. Stipulation. Filed July 10, 1899. D. H. Hart, clerk.

(*Certificate of Clerk.*)

Dated July 13, 1899.

THE UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk of the circuit court of the United States for the western district of Texas, hereby certify that the foregoing on twenty-six pages contain a full, true and corret copy of all papers filed and proceedings had in case No. 2306, S. M. & H. R. Burt *vs.* The Union Central Life Insurance Company, of Cincinnati, Ohio, as same appear on file and of record in this office; and that the original writ of error and waiver of citation in error are incorporated in this record.

In testimony whereof, witness my official signature and seal, at office, in Austin, Texas, this the 13th day of July, A. D. 1899.

[SEAL.]

D. H. HART,
Clerk of the U. S. Circuit Court for the Western District of Tex.

22 (*Extract from Minutes.*)

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1889, April 25, 1900.

S. M. BURT ET AL. }
vs. } No. 864.
UNION CENTRAL LIFE INSURANCE COMPANY. }

This cause was regularly called this day, and submitted to the court upon briefs of counsel heretofore filed.

(*Extract from Minutes.*)

November Term, 1900, December 4, 1900.

S. M. BURT and H. R. BURT }
vs. } No. 864.
UNION CENTRAL LIFE INSURANCE COMPANY. }

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered, and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiffs in error S. M. Burt, and H. R. Burt, and the sureties on the writ of error

bond herein George W. Littlefield and Wm. R. Hamby, be condemned to pay the costs of this cause in this court for which execution may be issued out of said circuit court.

23 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1900.

S. M. and H. R. Burt, Plaintiffs in Error,
vs.
THE UNION CENTRAL LIFE INSURANCE COMPANY OF Cincinnati, Ohio, Defendant in Error.
No. 864.

Petition for Rehearing by Plaintiffs in Error.

To the honorable the United States circuit court of appeals for the fifth circuit:

Your petitioners, plaintiffs in error in the above numbered and entitled cause, having carefully examined the opinion therein of this honorable court, think, and respectfully submit, that, with propriety, they may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to plaintiffs in error, on the following grounds, on which it is respectfully submitted that this court was in error in said opinion, to wit:

24 First. That, while a contract of life insurance in terms payable, notwithstanding the death of the assured at the hands of the law, as the result of capital conviction in the established courts of competent jurisdiction, in event such conviction should be unjust or unwarranted by the evidence, might and probably would be void, as being against public policy, the mere fact of the death of assured at the hands of the law as the result of such capital conviction, if he were in fact innocent (that is, either did not commit the crime or was insane when it was committed), would not avoid a contract of insurance otherwise valid.

Second. That the judgment and sentence to death of assured in a court of competent jurisdiction was admissible only because pleaded by plaintiffs in error, and even then could only establish the fact of its own rendition, and was neither admissible nor conclusive to establish the facts on which it was rendered, nor any of such facts, nor was it an adjudication of such matters as to be within any of the rules relating to *res adjudicata*.

Third. That liability of defendant in error on the policy of life insurance in controversy, same being originally a valid contract, could only be avoided by some subsequent act of the assured operating a forfeiture, and to effect such forfeiture assured must either have done some act expressly or impliedly forbidden, or omitted some duty expressly or impliedly required, by the contract. There is no omission of duty involved, and his sentence and death at the hands of the law furnished no such act, if in fact he was either innocent or insane at the time of the commission of the act for which he was convicted and executed.

Finally, plaintiffs in error respectfully suggest that this court

again consider the points taken in their brief filed herein to the effect that, the policy of insurance in controversy being silent thereon, the death of the assured William E. Burt at the hands of the
25 law as the result of the judgment and sentence of death pronounced upon him by the district court of Travis county, Texas, did not and could not preclude a recovery on said policy by plaintiffs in error, if in fact said Burt was either innocent of the crime for which he was convicted or insane at the time of its commission, if he did actually commit it.

Wherefore, upon the foregoing grounds, these plaintiffs in error respectfully pray this honorable court to grant them a rehearing of said case.

GARDNER RUGGLES,
Attorney and Counsel for Plaintiffs in Error, S. M. & H. R. Burt.

I, Gardner Ruggles, attorney and counsel for the plaintiffs in error herein, S. M. & H. R. Burt, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

GARDNER RUGGLES.

Austin, Texas, December 21, 1900.

26 (*Extract from Minutes.*)

November Term, 1900, January 15, 1901.

S. M. BURT and H. R. BURT
vs.
UNION CENTRAL LIFE INSURANCE COMPANY. } No. 864.

Ordered, that the petition for rehearing filed in this cause, be, and the same is hereby denied.

27 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1900.

Filed December 4, 1900.

S. M. and H. R. BURT, Plaintiffs in Error,
vs.
UNION CENTRAL LIFE INSURANCE Co., Defendant in Error. } No. 864.

Error to the circuit court of the United States for the western district of Texas.

Before Pardee, McCormick, and Shelby, circuit judges.

The case is stated in the opinion.

Mr. Gardner Ruggles was on the brief for plaintiffs in error.

Mr. Geo. F. Pendexter and Mr. Geo. E. Shelley were on the brief for defendant in error.

SHELBY, circuit judge, delivered the opinion of the court.

This suit is on a life-insurance policy and is brought by S. M. Burt and H. R. Burt, citizens of Texas, against the Union Central Life Insurance Company, a corporation chartered under the laws of Ohio. The policy was issued by the defendant on August 1, 1894, for $5,000, on the life of William E. Burt, and was payable at his death to his wife, Anna M. Burt, if living, otherwise to the executors, administrators, or assigns of the insured, within sixty days after proof of death. The annual premiums for the policy were duly paid. The policy contained no provision for forfeiture in the event that the injured should be executed under sentence of the law. On September 10, 1895, Anna M. Burt and William E. Burt assigned in writing to the plaintiffs, to whom they were indebted, a one-half interest in the policy. Anna M. Burt died intestate on July 24, 1896. She left surviving her no descendants, and her hus-
28 band, William E. Burt, became entitled to any interest she had in the policy. By assignment from William E. Burt, and as his heirs and next of kin, the plaintiffs are the sole owners of the policy.

William E. Burt was indicted for the murder of Anna M. Burt in the district court of Travis county, Texas, and was tried on November 27th, 1896. In addition to the plea of not guilty, he plead insanity. He was found guilty by the jury of murder in the first degree, and was by the court sentenced to be hanged, and on May 27, 1898, pursuant to the sentence, he was executed by the sheriff of Travis county, Texas. These facts are all alleged in the plaintiffs' petition. The petition then avers that the insured, William E. Burt, was in fact innocent of the crime of which he was convicted. To quote the petition as abridged by the plaintiffs' counsel. "Notwithstanding said conviction and sentence, said William E. Burt, did not in fact commit said murder nor participate therein, but that if he did, his policy was not avoided thereby because he was insane." The defendant demurred to the petition because it appeared therefrom that the insured died at the hands of the law under judgment of a court of competent jurisdiction. The circuit court, Judge Maxey presiding, sustained the demurrer. The plaintiffs declining to amend the petition, the case was dismissed. In this court it is assigned that the circuit court erred in sustaining the demurrer.

The industry of counsel has been able to find but one case in which a suit was brought on a life-insurance policy when the insured had been tried and executed for the commission of crime. That case is The Amicable Society *vs.* Bolland, 4 Bligh. N. R. 194, 211, and it is better known and oftener cited as the Fauntleroy case. It was an action by assignees in bankruptcy to collect a policy of insurance on the life of one Fauntleroy. The policy was made payable to his administrators or assigns. Fauntleroy was convicted of forgery, then a capital offense, and was executed. The Lord Chancellor (Lyndhurst) delivered the opinion. After stating the case, he said: "The question under these circumstances is this:

Whether the assignees can recover against the insurance com-
29 pany the amount of this insurance; that is to say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the noble lord now present, and we have both come to the conclusion that the assignees cannot maintain this suit.

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself, this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money, is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connections? Now if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, considering the policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy as far as that condition went at least, altogether void." This case has been cited approvingly in many text books on insurance and by the Supreme Court of the United States, Ritter *v.* Mutual Life Insurance Company of New York, 160 U. S. 139. That it correctly states the law has never been questioned so far as as we know. It is quoted and relied on by the learned counsel for both parties to this suit. It is conceded, however that there is a material difference between the facts of that case and this. Here the petitioners aver that the insured was
30 guiltless although convicted and executed. They aver in another count that, if he actually killed his wife, he was insane when he committed the act, and that the defense of insanity was presented unsuccessfully at the trial. If the insured did commit the homicide when insane, he was not guilty of murder. The meaning of the petition, therefore, is that at the trial of Burt, the insured, there was a miscarriage of justice—that he was unjustly convicted. It must be and is conceded as settled law that, if he had been rightfully convicted, his assignees could not recover on the policy because, as was held in the Fauntleroy case, (stating the point most favorably for the plaintiffs in error) the policy would have been void if it had expressly provided for payment of the amount thereof on the just conviction and execution of the insured. Does a contract for insurance, having no special provision on the subject cover the loss when the insured is tried and convicted in and executed

by an order of a court of competent jurisdiction, when he is in fact innocent of the crime with which he is charged? This precise question, we are advised by counsel, has never been decided. We will apply to the question the illustration used by the court in the Fauntleroy case. Would the policy sued on have been valid if it had provided, in the event of the insured's being indicted, tried, convicted, and executed for murder, when in fact he was innocent, that the amount of the policy should be paid to his administrators or assigns? This condition would not be as encouraging to the insured determined on crime as that supposed by Lord Lyndhurst, but it would at least let him understand that the provision he had made by insurance for those connected with him would not be conclusively lost by his conviction and execution,—that the beneficiaries would have a right of action on the policy with chances of success, even if he was apprehended, convicted and executed.

It is well settled that no one can lawfully contract to do that which has a tendency to be injurious to the public or against the public good. Can there be a legal life insurance against the miscarriage of justice? Can contracts be based upon the probability of judicial murder? If one policy so written be valid, the busi-
31 ness of insuring against the fatal mistakes of juries and courts would be legitimate. The same principle could be applied, in a kind of accident insurance to the miscarriage of justice in cases that led to convictions and punishments not capital. And in each suit to enforce such a policy the issue as to the fatal judicial mistake would be tried by another court and jury not infallible. That juries and courts do make mistakes is unquestionable. It may be admitted that the history of criminal jurisprudence shows that innocent defendants have in rare instances, by a departure from proper rules of evidence, been convicted of murder and executed. Cases in which the juries, the courts, and the pardoning power are so at fault, are so rare that they are not likely to be in the contemplation of parties making contracts of life insurance. The terms of the contract of life insurance, it seems, would exclude the idea, as in the case of suicide by the insured while sane, that death at the hands of the law was within the contemplation of the contracting parties. Ritter *v.* Mutual Life Insurance Company of New York, 169 U. S. 139. But if parties make express contracts on the subject could the courts lawfully enforce them? It is the policy of every State or organized society to uphold the dignity and integrity of its courts of justice. Such contracts would be speculations upon whether the courts would do justice. They would tend to encourage a want of confidence in the efficiency of the courts. They would tend to stir up litigation—litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kinds were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon by the executive. Such contracts would encourage litigation and bring reproach upon the State, its judiciary and executive, and would we think be against public policy and void. The policy of the law often permits and even requires for error a new trial of a

convicted defendant, but never after his execution. The principle that makes void a wagering contract as to a rise or fall in the price of goods in the markets, (Irwin *v.* Williar, 110 U. S. 499) would make void for stronger reasons a contract based on the
32 failure of courts and juries to perform their respective duties.

Now, to apply the reasoning of Lord Lyndhurst in the Fauntleroy case, if a policy with such a form of condition inserted in it in express terms cannot on grounds of public policy be sustained, a policy without such a condition cannot be enforced on the averment of facts which, if embraced in the written contract, would have made the policy to that extent void.

In some cases it has been held that a trial and conviction or acquittal in a criminal case is conclusive as to the facts decided when brought in question by the parties in a subsequent civil suit. Coffey *v.* United States, 116 U. S. 436; Roberts *v.* State of New York, 160 N. Y. 217, 224, and 30 Hun. (N. Y.) 106. But the authorities on this subject are conflicting. 1 Freeman on Judgments (4th ed.) sec. 319 and cases there cited. The assignee takes the policy subject to all defenses and equities which attached to it in the hands of the assignor. Bliss on Life Insurance sec. 331. If the judgment of conviction against Burt is conclusive as to his guilt in this suit by the assignees of the policy, this case would be brought precisely within the principle decided in the Fauntleroy case, for the averment in the petition of the conviction of Burt would avoid the effect of the allegation of his innocence. But we prefer to base our conclusion on the ground that a contract of life insurance, written to insure against a capital conviction in the established courts of competent jurisdiction in the event that such conviction is unjust and unwarranted by the evidence, is void as being against public policy.

The judgment of the circuit court is affirmed.

33 (Filed Dec. 4, 1900.)

S. M. BURT and H. R. BURT, Plaintiffs in Error,
vs.
UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, Defendant in Error. } No. 864.

McCORMICK, circuit judge, dissents.

I cannot concur in the judgment of the court in this case. It seems to me that the case does not call in question in any manner, or come under the authority of, or the reasoning in the case of Amicable Society etc. *vs.* Bolland, 4 Bligh, N. R. 194, 211.

The action might very well have been brought in the common form on the policy of insurance and left it to the defendant to raise by its answer the questions that are herein raised. The plaintiffs being so advised, chose to raise the question as they have done in their petition. The petition implies, if it does not expressly announce, that if the insured was in fact guilty of murder and his death occurred by the execution of the sentence against him for that crime, the proof of such facts would avoid the civil contract on

which this action is brought. The holders of the policy however, expressly allege that the assured did not commit the homocide charged against him, and that if he did commit the homocide he was in such condition of mental disorder as rendered him incapable at that time of committing murder. They allege that these pleas were presented on the trial of the indictment against the assured, and that on that trial, in a court of competent jurisdiction the verdict and judgment were rendered against him and sentence of death pronounced upon him and executed. The demurrer which was sustained in the circuit court must assume either that the death of the assured by a judicial sentence for crime, though in fact he was wholly innocent and merely the victim of mistake or miscarriage of justice, avoids the policy; or that the
34 judgment of conviction in the criminal case is not only admissible to prove both the sanity and the guilt of the accused, but that it is conclusive evidence of both. I fully concur with counsel for the plaintiffs in error that the first question has never been directly heretofore decided. It is certainly not decided in either the Fauntleroy case or the Ritter case. The first of those cases proceeds upon the admission or assumption that the assured was guilty of forgery as charged, and for which he was executed, no question being made as to his mental condition. In the latter case the question of the assured's sanity was submitted to the jury in the civil suit, and on the evidence and under the charge of the court, the jury found against the policy-holder. While the elaborate argument in the opinion of the supreme court announcing the decision of the case does not show that if the insanity of the assured had been shown, his suicide while in that condition would not have avoided the policy, it seems to me to strongly imply that it would not.

It seems to me that the ruling of the circuit court cannot be sustained except upon the second ground indicated above, and that the practical effect of the judgment of this court is to set aside a general rule, which has received immemorial recognition, to the effect that "a verdict and judgment in a criminal case, though admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action to establish the facts on which it was rendered." This is elementary. The reason of the rule, as expressed by Mr. Greenleaf, is "If the defendant was convicted, it may have been upon the evidence of the very plaintiff (or party claiming the benefit) in the civil action; and if he was acquitted it may have been by collusion with the prosecutor. But beside this, and upon more general ground, there is no mutuality; the parties are not the same; neither are the rules of decision and the course of proceeding the same." The judgment of a court of competent jurisdiction being a public transaction rendered by public authority, is presumed to be faithfully recorded. It is therefore the only proper legal evidence of itself, and is conclusive evidence of the fact of the rendition
35 of the judgment and of all the legal consequences resulting from that fact, whoever may be parties to the suit in

which it is offered in evidence. Thus, if one indicted for an assault and battery has been acquitted and sues for malicious prosecution, the record of acquittal is evidence for the plaintiff to establish that fact, notwithstanding the parties are not the same; but if he were convicted of the offence, and then is sued in trespass for the assault, the record in the former case would not be evidence to establish the fact of the assault, for, as to matters involved in the issue, it is *res inter alios acta*." 1 Greenleaf's Evidence, sec. 537, 538.

I am unable to see why public policy not only does not forbid, but seems to require the courts of public justice, at the suit of proper parties, to make new inquiry as to the guilt of one who had been criminally charged and convicted of making an assault, should forbid the making of the inquiry sought to be made in this case as to the real guilt of the assured in the matter for which he was charged, tried and executed. It seems to me that the public interest and a sound public policy give stronger support to the general rule in a case like the present than in a suit for damages by one claiming to have been assaulted by a defendant who had been convicted therefor in a criminal prosecution. In the case of Coffey *vs.* United States 116 U. S. 436, the parties to the civil suit were the same as the parties in the criminal action; the subject-matter was the same; the civil suit, if we may call it so, being for the recovery of a part of the punishment denounced by the penal statute against a crime charged in the criminal action. In that case the court say: "In both proceedings, criminal and civil, the United States are the party on one side and this claimant the party on the other. The judgment of acquittal in the crimina. proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the
36 claimant, in the criminal proceeding so that the facts cannot be again litigated between them as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

In the case of Roberts *vs.* State, 160 N. Y. 217, the parties in the civil action were the State of New York and the claimant being the same as the parties in the criminal action. And it is not held, as I read the decision, that the judgment of conviction in the criminal action was conclusive as to the fact of the guilt of the accused. On the contrary, the opinion asserts: "It was therefore incumbent upon him, the claimant, to establish that he was improperly convicted and imprisoned, and the amount of damages he had sustained by reason thereof. While a great volume of evidence was given upon the second question (the amount of damages), we find nothing in the record which justified the board in finding that his conviction and imprisonment were improper, but instead, the evidence upon which he was convicted and the judgment of conviction were introduced, both of which show that his conviction was proper; the former presumptively and the latter conclusively." By this last word "conclusively" the court could not have meant that no other

evidence on that subject should have been received, because if that had been their meaning, they would at once have held that the act of the legislature which authorized the proceeding was a void act, for this act recited upon its face that the claimant had been convicted and imprisoned for the alleged crime of burglary, and no question appears to have been made either in the act or before the board of claims that the conviction was not had in a court of competent jurisdiction.

37 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 37 pages, numbered from *a* to 36, inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court, and dissenting of McCormick, J., in the case of S. M. and H. R. Burt *vs.* Union Central Life Insurance Company, No. 864, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 2nd day of February, A. D. 1901.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] File No. 18,095. U. S. C. C. of appeals, 5th circuit. Term No. 282. S. M. Burt and H. R. Burt, petitioners, *vs.* The Union Central Life Insurance Company. Filed April 1, 1901.

38 In the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans.

S. M. and H. R. BURT, Plaintiffs in Error,
vs.
UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, OHIO, Defendant in Error. } No. 864.

In the above-styled cause it is agreed hereby, by and between plaintiffs and defendant in error, acting by their respective counsel, that whereas the Supreme Court of the United States has granted in said cause a writ of certiorari to review the proceedings and judgment of said circuit court of appeals therein, and required said last-named court to send to said Supreme Court the record and proceedings of said circuit court of appeals in said cause the clerk of said circuit court of appeals may make return to said writ of certiorari by transmitting to said Supreme Court of the United States a certified copy of this agreement, in lieu of said record, or a certified copy thereof, it being hereby expressly agreed that the certified copy of

the entire record of said court in said circuit court of appeals already on file in said Supreme Court (having been filed with the petition for said writ of certiorari) in said cause, which in said Supreme Court is No. 610, and entitled S. M. Burt and H. R. Burt petitioners *vs.* The Union Central Life Insurance Company of Cincinnati, Ohio, respondent, shall be used, taken and considered in all things, and to all intents and purposes as the record required by said writ to be sent up to said Supreme Court by said circuit court of appeals.

Witness *out* hands this 25th day of April, A. D. 1901.

S. M. BURT AND
H. R. BURT, *Plaintiffs in Error.*
By GARDNER RUGGLES,
Their Counsel.
THE UNION CENTRAL LIFE
INSURANCE COMPANY,
Defendant in Error.
By ROBERT RAMSEY, *Its Counsel.*

Endorsed: Filed May 4th, 1901. J. M. McKee, clerk.

39 I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth judicial circuit do hereby certify that the foregoing one page contains a true full and perfect transcript of the agreement as to return to writ of certiorari filed May 4, 1901, in the case of S. M. Burt, and H. R. Burt, *vs.* Union Central Life Insurance Company, No. 864 as fully and completely as the same now remains of record and on file in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court of appeals, in the city of New Orleans, on this 4th day of May, A. D. 1901.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which S. M. Burt and H. R. Burt are plaintiffs in error and The Union Central Life Insurance Company is defendant in error which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the western district of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed
41 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme

Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of April, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

42 UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The within writ of certiorari received this May 4, 1901, and for return thereto, I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit do annex hereto, and make a part hereof a true and correct copy of the stipulation of counsel filed in the within-named cause on the 4th day of May, 1901.

And I do certify that the transcript of the record now on file in the Supreme Court of the United States in the cause mentioned in this writ is a true full and perfect transcript of the record and all proceedings had in said cause in the United States circuit court of appeals for the fifth circuit.

Given under my hand and the seal of said court, this May 4th, A. D. 1901.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] File No. 18095 Supreme Court of the United States. No. 282, October term, 1901. S. M. Burt and H. R. Burt *vs.* The Union Central Life Insurance Co. Writ of certiorari and return. Filed May 10, 1901.